

Customary Law in the Papua New Guinea Village Courts

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On 16 September 1975, after almost a century of colonial rule, the Pacific Island state of Papua New Guinea became an independent nation. During the colonial period, customary law and traditional dispute settlement processes continued unofficially to guide the everyday lives of the people. But custom was recognized in the official courts only in limited circumstances. At independence, Papua New Guinea, like other newly emergent states, sought to turn away from its colonial past and to weld a unified nation partly through a reaffirmation of precontact customs and traditions. An attempt to integrate customary law into the formal legal system was a major aspect of this program, and among the measures enacted to carry it out was the creation of village courts, which were intended to be forums for the application of customary law and the use of customary dispute settlement methods such as negotiation and mediation.

In the first years of their operation the village courts were severely criticized for tending toward excessive legalism, copying the laws and procedures of the imported legal system, and neglecting the informal and compromise-oriented processes of traditional dispute settlement (Gawi, Ghai, and Paliwala 1976; Paliwala 1978; 1982; Fitzpatrick 1980; Snyder 1980; Iamo 1987). Even those observers who disagreed with the severity of these critiques confirmed that adjudication in the village courts was tending toward formalism, although they found elements of customary law and process in the courts' activities outside official hearings (Scaglione 1979; 1983; Scaglione and Whittingham 1985; Westermarck 1978; 1985; 1986; A. Strathern 1984; Gordon and Meggitt 1985).

Most of the studies of village courts occurred in the first years of their operation, between 1976 and 1979, and were as much predictive as experi-

ential. In 1988, we began a new study of village courts,¹ partly to determine whether they had forsaken custom, as their early critics warned. If, in their formative years, the village courts adopted a Westernized model for adjudicating disputes, then one might expect in 1988, approximately ten years after most of the studies were done, to find this legalism deeply entrenched. Instead, the village courts that we observed in 1988 continue to exhibit a mixture of customary and court-like characteristics, and the courts' application of customary law and traditional methods of dispute management occurs not only in their extrajudicial activities but also in the context of official court hearings. If the village courts had become entirely, or even primarily, mimics of the imported courts, then it would be appropriate to ask whether any institution can successfully apply customary law in a society radically changed from the collection of homogeneous and essentially independent villages in which customary norms and methods of conflict resolution were fashioned. However, because the village courts have effected a blending of custom and the imported legal system, it seems more apt to consider their process as an example of the kinds of change that customary law undergoes as it operates in a transformed environment.

THE RECEPTION OF CUSTOMARY LAW IN THE MODERN STATE

Many former colonies have at independence expressed an intent to revitalize precolonial legal processes, but by and large they have not succeeded in freeing themselves from the dominance of legal systems imposed during the colonial period. In Papua New Guinea, for example, the higher trial and appellate courts virtually ignored custom in the years immediately after independence (Law Reform Commission 1977; Lynch 1976; O'Neill 1976; Ottley and Zorn 1983; Weisbrot 1987). A variety of theories have been advanced attempting to account for this. Legal historians point to the denigration of customary law in some colonies, when colonial administrators refused to consider it law at all and announced that the law of the colonizer was being imported into an otherwise lawless situation (Bayne 1975). Modernization theorists, arguing from the assumption that Western legal processes lay the groundwork for economic and political development to occur, posit that a return to non-Western law would inhibit development (Trubek and Galanter 1974; Merryman 1977). Dependency theorists counter that former colonies, though politically independent, are still

economically dependent on the West and therefore inclined to shape their laws in ways approved by Western powers (Snyder 1980). Neo-Marxists point out that the imported law, which protects the interests of individual entrepreneurs and the propertied classes, is more suited to the class system of capitalism than is customary law, which supports equality and reciprocity (Fitzpatrick 1980). Others have noted that the creation of the nation-state requires the concomitant development of a legal system of codes, courts, and cases, in order to support the authority of and give legitimacy to the new nation-state apparatus (Diamond 1973).

What most of these explanations have in common is the unexamined assumption that Western law and legal procedures are better suited to large, heterogeneous societies (in which the distribution of economic resources and social rewards is determined by the market or by the state) than is custom, which operates in small, undiversified societies (in which the major allocative modes are reciprocity and redistribution). Early studies of village courts, which found them to be adopting the formalism of the imported courts, supported the view that custom is inapplicable to the complex socioeconomic system that Papua New Guinea had become. But, if village courts are successfully applying customary norms and using customary procedures, one can argue that customary law does have a place in a diversified state system. The question then becomes not whether customary law can succeed in a changed environment, but what the form, content, and role of customary law will be. A thesis of this article is that custom will have an impact on its environment and, conversely, that custom itself will undergo changes caused by its interaction with the transformed environment in which it now operates.

The role of custom as part of a state structure will be very different from its role as the sole normative system of clans and village. The village courts are the lowest rung of the national court hierarchy. They were created to serve rural villagers and the urban working class. They do not hear cases involving major corporate or governmental interests. They can be seen either as methods of containment, in that they placate the common people with customary law, while important business, governed by other laws, goes on elsewhere (Fitzpatrick 1980); or, if one puts one's faith in the common people, the village courts can be seen as agents for social change, in that their reinforcement and restatement of customary norms will have an impact in shaping the nation's economic and political future.

THE STRUCTURE AND FUNCTIONS OF THE VILLAGE COURTS

Although state recognition of customary tribunals at the village level was periodically debated from the late 1940s through the 1960s, a village court system was not adopted until the Village Courts Act was passed in 1973 (Chalmers 1978). The first village courts were officially established in 1975 (Village Courts Secretariat 1976). The Papua New Guinea Village Courts Secretariat, a division of the Ministry of Justice, reports that by July 1988 more than nine hundred village courts were in operation, serving approximately eighty percent of the population of the country. While most village courts are in rural areas, a few were established in 1988 in urban neighborhoods. Some of these urban courts handle disputes among people from different areas of the country, who may have different customs; others have been established in settlements composed of people from one area of the country with a single customary legal system.

The officers of the village courts include magistrates, clerks, and village court peace officers. The magistrates are supposed to be representative of the traditional population groupings of the area, and no formal qualifications for the position are required. They are nominated by the village courts secretariat after consultation with local persons and groups including the local government council, and are appointed by the minister for justice. Some of the magistrates hold traditional leadership positions in their villages or clans; others, representative of the emergent middle class, own trade stores or coffee acreage or are minor public officials.

According to section 52 of the Village Courts Act, "[t]he primary function of a Village Court is to ensure peace and harmony in the area for which it is established by mediating in, and endeavouring to obtain just and amicable settlements of disputes." The act's vision of the courts was modeled on reports of unofficial moots conducted by villagers during the colonial period (M. Strathern 1972; Epstein 1974; Reay 1974). To this end, sections 57 and 58 of the act direct magistrates to decide matters before them "in accordance with substantial justice" and to apply "any relevant custom" even though it is inconsistent with statutory law. In addition, local government councils may make rules declaring custom, which are then binding on the village courts.

Village courts have jurisdiction over both criminal offenses and civil disputes. The act restricts the courts' criminal jurisdiction to minor offenses and to breaches of local government council rules. The courts

may impose a fine of up to K200 (K1 is the equivalent of approximately US \$1.20) or up to six months of community work. A K200 fine is a very large amount for a subsistence farmer in a country where the per capita share of gross national product was only K695 in 1986 (World Bank 1988, 3). An imprisonment order may be issued only if an order of the court has been ignored or if a person obstructs the work of the court. The act extends the courts' civil jurisdiction to all disputes that arise within their territory, except disputes over ownership of land and those involving the driving of a motor vehicle. In resolving a dispute, the court is limited to an award of up to K1000 compensation or twelve weeks' work for most matters, but there is no limit on the amount of compensation that may be awarded for cases involving child custody, bride-price, and death.

In civil matters, the act requires that magistrates first attempt to mediate the dispute. Only if mediation is not successful may the court exercise its compulsory jurisdiction to hold a hearing and adjudicate the issues. An appeal may be made from the decision of a village court to a local court or district court magistrate, who sits with two village court magistrates to hear the appeal. In addition, local or district court magistrates may choose to review village court cases, even if the parties have not appealed.

THE "WESTERNIZATION" OF THE VILLAGE COURTS

A village court hearing is in many ways unlike a traditional village moot. Many village court magistrates do not attempt informal mediation before holding a formal hearing and adjudication. Hearings are held in nontraditional venues and buildings, with Western trappings such as flags and benches. Village court peace officers, sporting natty blue uniforms and bright red badges, officiously maintain order and decorum in the court. The magistrates limit participation in hearings to the parties directly involved in the dispute, instead of seeking contributions from all the villagers. The rules of procedure and evidence are strictly construed so that debate is limited to the immediate issue. The village courts have been subjected to considerable criticism for adopting these indicia of the imported legal system. The Goroka Conference on Village Courts, sponsored by the Papua New Guinea Law Reform Commission in 1976, for example, concluded that the village courts were already behaving too much like the imposed Western-style courts (Gawi, Ghai, and Paliwala 1976, 264).

This criticism of the village courts is based on the notion that there are

two models of dispute settlement—a “court model” and a “compromise model”—and that village courts, which were intended to observe the compromise model, have strayed into the court model. Drawing on the work of Nader (1969), Abel (1973), and Gulliver (1973), Westermarck has summarized the major features of the two models:

[F]irst, court proceedings are triadic, or involve a third party to the discussion of the dispute, whereas compromise proceedings are dyadic; second, in court proceedings, the third party holds coercive power that can be applied to the litigants, a power that does not exist in the compromise proceedings; third, norms are applied within the court, in contrast to the pursuit of interest by the compromising parties; fourth, the court is interested in establishing the past facts of the case, whereas facts are less relevant in the compromise situation; this is because, fifth, the court is interested in resolving a particular trouble case that occurred in the past, while compromising parties are attempting to establish their own most positive position as they see it for the future; sixth, the conclusion of the court proceeding is a verdict, whereas compromising results in an agreement; seventh, outcomes are typically winner-take-all in the court proceedings and, as its name would indicate, compromises in the compromise proceedings. (Westermarck 1978, 82)

Models are idealized abstractions from reality, and as such their nature is to be oversimplified and incomplete. Reliance on them to describe actual social conditions can be misleading. The idealization of customary law as compromise-oriented and common law as rule-oriented is enlightening to the extent that it alerts us to differences in emphasis between the two legal regimes, but it can be dangerous if we then expect reality always to conform to it. Customary law is not always compromise-oriented. It may not even be usually compromise-oriented. Papua New Guinea village disputes might go on for years; compromise settlements might be reopened again and again; and for a winner-take-all solution, nothing beats tribal war. Nor do common law judges always avoid compromise and apply the rules with rigid certainty. Most common law rules are phrased at a level of generality that makes it possible to change them to meet changing social conditions and to adapt them to effect what may actually be a compromise decision.

In their rigidity, models fail to take account of people's ability to construct a unique reality out of the common means available to them. Living institutions, such as the village courts, exhibit characteristics of both mod-

els, blended in ways suited to the needs of the participants in the institution. "By limiting the observer's interpretive framework, the application of the models may deny the cultural creativity of the people whose dispute processing is being observed" (Westermarck 1978, 83). The models do have some utility, however, in emphasizing that court and compromise proceedings have very different purposes and are expected to obtain very different results. In general, the court model leads to the reification of rules, the assertion of rights, and finality of outcome. The compromise model is flexible and intended to maintain or restore amicable social relations. The court model is law-centered; the compromise model is centered on the parties to the dispute.

However, few of the critics of the village courts have based their preference for the compromise model on the results it is expected to obtain. Nor do they discuss whether and how a compromise model can be maintained when the society in which it was created has been radically transformed. Papua New Guinea is rapidly moving toward capitalism, so that even in rural villages, which were once relatively homogeneous and egalitarian, there is now increasing division of labor, mobility, and the beginnings of economic and status distinctions. The critics seem to prefer the compromise model merely because they believe that is what the village courts were supposed to be. Instead, studies of village courts ought to be focusing on the complex interchanges between the customary and the imposed systems—on ways in which customary law and the compromise model can adapt to changing socioeconomic circumstances, and the extent to which the persistence of traditional dispute settlement practices will alter or ameliorate the effects of capitalist development.

Some commentators have noted that those who planned the village courts never intended them to be solely in the compromise model. Chalmers pointed out that the impetus toward the establishment of village courts occurred prior to Papua New Guinea's independence and came not only from nationalists, who wanted to return law and legal process to the people, but also from colonial officials, who wished to use village courts to promote law and order in rural areas (Chalmers 1978, 72). Property crimes, such as theft and vandalism, were increasing in Papua New Guinea's rural villages in the late 1960s, as was tribal fighting. One response of the colonial secretary for law was to advocate the creation of village courts with criminal jurisdiction (Territory of Papua-New Guinea 1971).

After the declaration in Papua New Guinea of self-government in 1972, interest in village courts grew, as did the controversy about whether their primary purpose was to be a forum for traditional dispute settlement or a means to promote order and control crime. A countrywide study by two district court magistrates (one an expatriate and one a Papua New Guinean) recommended that courts on the compromise model be set up in the villages, with the power to settle disputes, award compensation, and apply customary law (Desailly and Iramu 1972; Iramu 1975). However, a study of tribal fighting by another government committee proposed that the village courts have the power to punish those found guilty of offences (Committee Investigating Tribal Fighting 1973). This report also proposed that peace officers be appointed to assist the village courts in enforcing their criminal jurisdiction. The act consequently passed by the House of Assembly was a melding of the proposals of both reports, and the combination in the village courts of civil and criminal jurisdiction and of elements of both compromise and court models is not a happenstance of court operations, but is built into the village courts' charter document.

Several studies of village courts in the late 1970s found in their functioning aspects of both the court and the compromise models. These studies—of the Highlands Enga, of the Melpa of the Western Highlands, of villages near Kainantu in the Eastern Highlands Province, and of Maprik in the East Sepik—illustrate that, within the confines of the Village Courts Act, magistrates in different areas solve the unique problems of their areas in unique ways, so that each court is slightly different from every other. At the same time, the courts faced common problems, which they solved by somewhat similar means. The courts were similar in that each adopted the formalist model in the architecture and furnishing of court buildings, the uniforms and behavior of court officers, and the restrictive view that magistrates took of the proceedings and evidence relevant to the dispute (Gordon and Meggitt 1985, 231; A. Strathern 1984, 130; Westermarck 1978, 83–84; Westermarck 1986, 137; Scaglione 1979, 121–126). The courts were also similar in that each followed the compromise model in settling disputes, although none did so as part of their official hearing process. In courts near Kainantu, for example, Westermarck found that while the hearings were conducted in a Westernized way, the magistrates' subsequent dispositions of cases contained many aspects of the compromise model. Magistrates often fashioned their disposition of a case to take account of issues that went beyond the immediate dispute or to give something to both sides

and aid in restoring peace between the parties (Westermarck 1978, 86). Compensation was the most common remedy, and warnings or no orders at all were more common than fines or other penalties (Westermarck 1986, 143). In addition, although village court magistrates in Kainantu did not mediate disputes as part of official court proceedings, they recognized and supported the village's role in informal dispute settlement and referred some disputes to that forum for mediation. Magistrates made the choice between informal village mediation and a court hearing on the basis of the relationship of the parties and the depth of their enmity, sending to mediation those most likely to be resolved in that fashion and saving for adjudication those less likely to respond to mediatory attempts (Westermarck 1978, 86).

Similarly, in his study of village courts in the East Sepik, Scaglione found that the relatively formal court hearings were supplemented by informal mediation held in the village, although the terms of the relationship differed from that of the courts Westermarck observed. In Maprik, the choice of forum seemed not to be made by the magistrates, as it was in Kainantu, but by the parties, and not on the basis of their difficulty in reaching accommodation, but according to the subject matter of the dispute. Non-traditional matters (such as drunkenness or failure to do work ordered by the local government council) tended to be brought immediately to the village courts for a hearing, while traditional matters (such as land use, sorcery, or bride-price) were brought to informal sessions. If mediation did not settle a dispute, it might go before the village court for a formal hearing (Scaglione 1979, 124-129).

Village court magistrates often acted as mediators in these informal proceedings, but other important men in the village might also mediate disputes. Magistrates were more likely to be asked to mediate because they were village leaders or because they had served in governmental positions than because they were magistrates. In the Western Highlands, villagers hear disputes informally right outside the entrance to the village court building, using local government committee members as mediators (A. Strathern 1984, 63, 127-128). It is not unusual for Papua New Guineans who have been appointed to minor positions in the government to serve as mediators in informal village dispute settlement. This was a common occurrence during the colonial period as well (Epstein 1974, 19; Reay 1974, 212-213).

Although compromise-oriented dispute-settlement methods are as

much a part of the total village court process as are formalism and the court model of dispute resolution, informal proceedings occur outside the time and place designated for village court hearings, and the results do not get written up in court order books. In such cases, supervising magistrates and academic observers alike may fail to recognize that they are part of the courts' dispute settlement process. While village courts are officially the lowest level in Papua New Guinea's judicial system, informal mediation has functionally, if not officially, become a part of the judicial system as well (Westermarck 1978, 87; A. Strathern 1984, 121-128). Paradoxically, by serving as an alternative to traditional dispute settlement, village courts enhance the effectiveness of the traditional forum (Gordon and Meggitt 1985, 232). The nexus between informal moots and the village courts is apparent to the participants, both through the functioning of village court magistrates as mediators and in the frequent reminders to parties by the mediators that a village court hearing is the next step for unresolved disputes. A division of disputes into those that will be heard by the village court and those that will be negotiated informally may not comply with the letter of the Village Courts Act, which requires that all disputes be mediated, but this practice fulfills the expectations and purposes of the act in maintaining traditional dispute settlement and customary law (Scaglion 1979, 128).

The creation of village courts has broadened the choice of remedy agents available to litigants, who can pursue one or more informal avenues before moving to a village court hearing (Scaglion and Whittingham 1985, 125-126). But some commentators have argued that, by insinuating a state institution into an area that had been independent of state control, village courts do not maintain customary law, but usurp it. Paliwala, for example, has noted that the Village Courts Act makes customary law subservient to state law in a number of ways (1982, 191). Traditional moots were the people's law. The villagers themselves called for a dispute settlement proceeding, fashioned its procedure, and decided whether to abide by its outcome. The creation of village courts constitutes "a radical departure from pre-existing forms of dispute settlement, and social control generally, in rural society. The key changes are a greater involvement and control by the state and a degree of authoritarianism on the part of court officials. The result is relatively alienated dispute settlement with little scope for community involvement and party consensus" (Paliwala 1982, 191). First, the introduction of criminal jurisdiction gives magistrates the

authority to choose the appropriate remedy. The court can decide to issue fines and work orders, even where the parties might have wished to treat a matter as one for compensation only, to settle or drop the case. Second, by giving village courts the power to imprison persons who disobey court orders, the act has vested the village courts with the state's power to use force. Third, the operations of the village courts are supposed to be closely controlled by the state. Magistrates are nominated by the village court secretariat and their appointments are confirmed by the minister for justice. The operation of the village courts is overseen by local and district court magistrates, dissatisfied parties may appeal certain orders of a village court to a local or district court, and, in a measure of hierarchical control unusual within common law jurisdictions, a local or district court magistrate may review the order of a village court, even when the parties have not appealed the order (Paliwala 1982, 198).

Fitzpatrick has argued that customary law itself is a creation of colonial authorities and its maintenance among the rural peasantry is merely a containment mechanism, allowing the common people to have the indicia of independence and self-rule while denying them the realities of power (1980, 136). The introduction of village courts, Fitzpatrick has said, was not chosen by the people, but was "thrust upon them" by a government concerned to contain illegality and unrest (1980, 144). Village court magistrates tend to be "middle peasants" or minor government officials, wealthier than the people they are supposed to serve and more interested in self-advancement than in trying to preserve the independence and egalitarian economy of the village or the integrity of customary legal process (Fitzpatrick 1980, 143).

Some of the findings of these critics have been disputed (in part, perhaps, because village courts, responding to the social conditions of the areas they serve, are developing differently in different places). Village courts in Enga were not thrust on the area, but were established only after local people, concerned about tribal fighting, requested them (Gordon and Meggitt 1985, 221-222). The process by which magistrates are selected differs from one area to another. Fitzpatrick stated that magistrates are invariably appointed by local government councils, and Andrew Strathern found that magistrates in the Western Highlands are appointed, but magistrates in the Eastern Highlands are popularly elected, and in Enga they tend to be chosen by clans (Fitzpatrick 1980, 143; A. Strathern 1984, 62, 126, 140; Westermarck 1986, 136; Gordon and Meggitt 1985, 222-

225). Magistrates are not always “middle peasants” or government workers. They are as likely to be traditional leaders as they are to represent new interests, and those magistrates who have had experience as government officials do not invariably pursue government policies. They are often chosen because their knowledge of government and access to its institutions makes them more effective representatives of the people (Westermarck 1986, 136).

While some of their findings can be disputed, Fitzpatrick, Paliwala, and other critics of village courts are probably correct in their ultimate intuition that one of the government’s purposes in enacting the Village Courts Act was to replace the “informal machinery which might threaten the stability of the colonial and post-colonial state with a system which the state can control” (Paliwala 1982, 197). It may not be true, however, that this purpose has been realized. A statute’s operation does not necessarily carry out the aims motivating its enactment, and the critics are overstating the case (and underestimating the power and creativity of village people) when they presume that the existence of state authority leaves no room at all for local initiative or autonomy. The imposition of law is not a one-way street in which people blindly obey each new dictate, but a mediated process of acceptance, negotiation, and reinterpretation by which people make the law their own and, in so doing, alter it (Kidder 1979; Moore 1978; 1986; Roberts 1981; Griffiths 1986). Even the most courtlike of the appurtenances of the village courts—the governmental style of the court architecture, the decorum expected of litigants, and the evidentiary rules at hearings—are used by magistrates to obtain the authority (both symbolic and real) that they need for themselves and their courts in order to pursue the very traditional aim of settling cases in ways that will promote peace and reconciliation in the village (Westermarck 1978, 91–93; Gordon and Meggitt 1985, 231).

The operation of the village courts is the result of a complex process of mediation between government law and people’s law, a process in which both undergo alteration. Interpreting the Village Courts Act to suit local circumstances, magistrates and parties alike alter its procedures in ways that, given their social conditions, make sense of the act for them and comport with their notions of customary law and dispute settlement as well as their notions of the proper functions of the government’s courts and laws. In the process, however, custom changes as well. Informal moots, once conducted by traditional leaders, are now led by village court

magistrates and others whose status comes from their positions as government officials, and the newly created remedy, should the parties continue to disagree, is that their cases will be set down for hearing in the village court.

The creation of the village courts means that Papua New Guinea villages can now seek state backing to enforce their norms. At the same time, however, they may not be able to avoid state intervention in norm enforcement. Underlying the critiques of the village courts is the unstated assumption that traditional dispute settlement cannot survive in a world in which Papua New Guinea villages are no longer politically independent entities, free of any connections to a larger political whole. It is the thesis of this article, however, based on observations of two village courts in 1988, that traditional dispute settlement procedures and norms are to a large extent surviving within the village courts, not only in extracourt informal moots, but within the context of village court formal hearings as well. Given the socioeconomic changes that have occurred in Papua New Guinea, customary law cannot survive in any way other than by seeking the support of the state and by melding with, and adapting itself to, some aspects of the court model. In this unique melding, customary law is undergoing change, but so too does it change and redirect the socioeconomic and legal matrices in which it is operating.

CUSTOMARY LAW IN THE VILLAGE COURTS OF TUBUSEREA AND GEREHU

Our study focused on the village courts of Tubuserea and Gerehu, both of which are located near Port Moresby, the capital of Papua New Guinea. If village courts were in their early years leaning toward the court model, one might expect almost ten years later to find the court model deeply entrenched. And, given the proximity of Tubuserea and Gerehu to the capital (which is also Papua New Guinea's economic and educational center), one might expect these courts (and the population they serve) to be heavily influenced by the substance and process of the imposed legal system and to exhibit even more tendencies toward Westernization than would village courts in rural areas. Instead, we found the magistrates of both courts using customary law and traditional dispute settlement methods even in the conduct of formal hearings.

Tubuserea is a Motu village, of about three thousand people, approxi-

mately fifteen kilometers from Port Moresby. Although Tubuserea is at base a traditional community that existed on its present site for generations prior to the colonization of Papua New Guinea, many of its Motu inhabitants are now employed in government or industry and commute daily to Port Moresby. In many respects Tubuserea still has the aspect of a traditional fishing village, with stilt houses, under which dogs and pigs are free to roam and tides ebb and flow, but there are also houses built of imported materials, electricity, automobiles, and boats with outboard motors.

While the Tubuserea Village Court was among the earliest established and has been in operation since 1975, the Gerehu Village Court did not begin operations until 1988, and was holding only its third fortnightly session when this study began. The Gerehu court is part of a program to extend village courts from their rural beginnings into urban settlements, a program developed partly as a response to the escalation of crime and the development of criminal gangs in Papua New Guinea's cities (Keris 1986, 70; Clifford, Morauta, and Stuart 1984). Gerehu, a new and growing community of about twelve thousand people, is located within five kilometers of the university and the government complex, and was constructed (as a neighborhood of single-family houses, many of which are held on long-term lease from the government) to house people who had emigrated to the capital from all regions of Papua New Guinea. The residents of Gerehu represent many of Papua New Guinea's different areas of language and custom and are widely differentiated in terms of their work and income in the urban sector as well.

The Tubuserea and Gerehu village courts are prime testing grounds for theories about the adaptability of customary law to a new environment. First, a Westernized economy emphasizes individual property rights and land as capital and commodity, and exhibits differentiation in work, income, and status; if customary legal process is not adaptive to that economy custom will play a lesser role in these village courts than it does in the courts in rural areas. Second, if local customs are so distinct from one area to another that it is impossible to formulate a national customary law, the village court in Gerehu will eschew the application of customary law. Instead, we discovered in the operation of both the Tubuserea and the Gerehu village courts the application of substantive customary norms and the use of customary dispute-settlement processes.

From our observations of hearings in these courts, I have selected a typical morning in each and will describe all the cases as they came before the

court on those days. My purpose is twofold: to give the flavor of a day in a village court, and to provide a sample that illustrates the range of issues, parties, and responses of magistrates to the cases that generally come before each of the courts.

Cases in the Tubuserea Village Court

The court session in Tubuserea began on a Wednesday morning at about 10 AM, in a roped-off area in the center of the village, where the three magistrates sat at a table placed under a shade tree. The magistrates were respected older men, all of whom had devoted their lives to village affairs and did not work in the urban sector. Court proceedings were conducted in Motu, the villagers' native language.

The first case was brought by the parents of a young man, about twenty years old, who had moved into the house of a young woman from the village. The parents asked the court to order him to return to their house. Although it was not at first mentioned, it soon became apparent that the parents were not prepared to pay bride-price at that time. Bride-price in Tubuserea has grown in recent years. Two weeks earlier, the bride-price for one young woman in the village was K14,000 in cash and more than K2500 in coffee, tea, sugar, and rice. After hearing evidence from the young man, his parents, his sister, and the young woman, the court adjourned for a few minutes while the magistrates conferred. They then told the parties that the court did not have the authority to order the young man to return to his parents' house. Nor, since the young woman was not pregnant, did they have the power to order the payment of bride-price. However, the court advised the young man that he and his parents should meet with the young woman's parents to see if marriage and bride-price could be arranged.

In the second case, a younger brother had accused his older brother of causing the death of their father by sorcery and had threatened to find a sorcerer to harm the older brother. The case was brought by the older brother, requesting that the magistrates refer the dispute to mediation. The court questioned both brothers and again adjourned for a few minutes. When they reconvened, the magistrates said that there was no evidence that the older brother was responsible for sorcery. They scolded the brothers, saying that they had both cried when their father died and that they should work out their differences between themselves, remembering that they were brothers.

The third case involved a claim by the uncle of a recently married

woman that, as immediate younger brother of the bride's mother, he ought to have had the responsibility for gathering and distributing the bride-price, a function that had been taken over by two of the mother's uncles. To establish the customary norm of who is responsible for distributing the bride-price, the court called a village elder, who stated the custom (to which the parties agreed) that it was the role of the younger brother of the bride's mother. However, the mother's uncles argued that they were justified in taking over the function in this case for three reasons. First, the mother's brother had not contributed to the amount that would be given to the groom's family in exchange for the bride-price. Second, he did not account for some of the money he received. Finally, there was no unfairness to him in their distribution of the bride-price in that he was given K30, while they kept less than K30 each. The magistrates agreed that according to custom bride-price ought to be distributed by a mother's brother but held that the mother's uncles were justified in this case in taking over the distribution because of the conduct of the mother's brother.

Cases in the Gerehu Village Court

The fortnightly Wednesday session of the Gerehu Village Court began with the peace officers and magistrates lining up on opposite sides of the court table to be led in prayer by the senior magistrate. The prayer, like most of the business of this court, which serves a settlement of people who speak many of Papua New Guinea's seven hundred different languages, was spoken in Tok Pisin, one of the lingua francas of the country. Court was held on the veranda of the Gerehu local council office, next door to the outdoor stalls and lively bargaining of the public market. The three magistrates, the senior magistrate (who was not officially hearing cases that day, but who frequently gave his colleagues advice), and the clerk all hold minor public-service positions. In three of the four cases heard that morning, plaintiff and defendant were originally from different parts of Papua New Guinea.

The plaintiff in the first case, a man from Goilala, had paid K50 to the defendant, a police officer originally from Morobe, who had promised to give the plaintiff a driver's license. The defendant had neither supplied the promised license nor returned the money. He argued that he was merely a conduit for payments to another police officer who regularly sold driver's licenses. There was no discussion, during the presentation of evidence, of the distinctions between lawful and unlawful means of giving and obtain-

ing driving licenses. At the conclusion of the evidence, however, the magistrates held a short conference among themselves and returned to lecture both parties on the evils of bribery, to order the defendant not only to repay K50 to the plaintiff but also to pay a fine for bribery of another K50 to the court, and to order the plaintiff to pay to the court a fine of K20 for his part in attempting to obtain a license improperly. When the defendant debated the verdict, arguing again that he was merely a conduit for another officer, the magistrates agreed to postpone their order for two weeks, when a hearing could be held with additional witnesses present.

The second case also involved an unlawful activity and the nonpayment of money. The plaintiff had given K25 to the defendant, who had promised to buy him beer at an unlicensed shop. The defendant had not bought the beer and had returned only K5 to the plaintiff, who asked for the return of the K20 and K10 in interest. The magistrates responded with a stern lecture to the parties against drinking in general and attempting to buy beer from black-market dealers in particular, but ordered the defendant to repay to the plaintiff the K20 outstanding, plus K5 in interest.

In the third case, a woman originally from Popondetta, a coastal community, asked the court to order her husband, who had been several months in his home village in the Highlands, to return to her and their children in Gerehu. The man was represented at the hearing by a *wantok* (a man from his Highlands clan). The magistrates declined to order him to return, explaining that he had broken no law. They suggested to his *wantok*, however, that it would be a good idea for the errant husband to return to his spouse and that his *wantoks* should persuade him to do so. They also informed his wife that she could ask the welfare office to order him to pay maintenance for her and the children.

The fourth case of the morning had arisen at a prior hearing, when the plaintiff, a woman originally from the Simbu area of the Highlands, accused the defendant, a woman from the Sepik, of making insulting statements. At the earlier hearing, the magistrates had learned that the statements were made in the course of an argument between the women over a garden plot, and the hearing had been adjourned so that witnesses to the women's use of the garden could be called. The garden is located on a hill above the settlement, where many Gerehu residents have made small gardens. At this morning's hearing, a village court peace officer testified that, from his garden higher up the hill, he had often observed the defendant working in the garden, but had never seen the plaintiff, except when

she came to gather produce. On the basis of this testimony, the magistrates ordered the plaintiff to give K2 to the defendant in payment for pumpkins that the plaintiff had taken from the garden and to give K5 to the court as a fine for taking produce from another woman's garden. The court did not order the defendant to pay anything in compensation or as a fine for the insults that had prompted the case, although they did counsel her against the use of intemperate language. At first, the plaintiff reacted angrily to the verdict, shouting that she would clear all the pumpkins from the garden and stalking off to confer with a small group of *wantoks* who had gathered under a tree a few yards from the court. However, she returned in a few minutes to tell the court that she would accept its decision, because in criticizing the defendant's language the court had upheld the plaintiff's dignity.

Formalism in the Tubuserea and Gerehu Village Courts

The hearings of these cases in the Tubuserea and Gerehu village courts differed from traditional village dispute settlement in four important respects. First, the surroundings in which the hearings took place differed in architecture and furnishing from the open village ground or men's house where traditional moots occur. Second, the magistrates and peace officers rigidly maintained decorum among themselves, the parties, and the onlookers to the hearings. Unlike many informal moots, direct participation was limited by the magistrates to the parties and a few witnesses; this was no village-wide give-and-take session. Third, the magistrates controlled the proceedings, taking turns to question the parties, and their questions tended to keep the issues and evidence narrowly focused on the immediate dispute. The magistrates did not often stray in their examination of the parties into a more general discussion of related disputes or other aspects of the parties' relationship. Fourth, by their maintenance of a central and authoritative role in the proceedings, the magistrates established the appearance that they, rather than the parties, were the focus of the hearing.

In their architecture and furnishings, the village courts of Tubuserea and Gerehu attempt, as do village courts elsewhere in Papua New Guinea, to recreate the atmosphere of formal government offices. Hearings in the Tubuserea Village Court take place in a roped-off area in the center of the village, under a large shade tree opposite the church. The three village court magistrates sit behind a wooden table, attended by seven peace offi-

cers dressed in blue uniforms similar to those worn by the national police force. Some of the peace officers sport handcuffs, although these did not appear to be needed at the hearings. A number of villagers sat quietly through the hearings, in small groups outside the ropes that defined the boundaries of the court. They listened to the cases, but did not offer advice or comment or participate in the proceedings, except when a few of them might be asked by the magistrates to do so.

In Gerehu, the village court convenes on the veranda of the local council office, a concrete and fiberboard structure painted a livid yellow. The magistrates and clerk sit at a large table on the veranda, with the flag of Papua New Guinea prominently draped behind them. The site is separated from the Gerehu open market (where locally grown produce, betel nut, and string bags are sold) by a wide gravel driveway and a chain link fence. The people at the bustling market took little interest in the village court proceedings (they were more intrigued by a television monitor that had been set up in the market to play videotapes of "Sesame Street" and "The Flintstones"), although a few *wantoks* of the parties did gather under a tree by the chain link fence. The onlookers could see the village court proceedings from their vantage point under the tree, but could not hear them.

The behavior of officials, parties, and onlookers at the hearings is maintained at a level of high decorum. At Gerehu, for example, the more senior magistrate was the first to question the parties, followed in turn by the two magistrates flanking him at the table. The parties, who stood before the magistrates' table for the duration of the hearing, with peace officers on either side, were limited to answering questions posed by the magistrates, and were not permitted to interject or to debate with one another. The peace officers were assiduous at shushing parties who spoke out of turn and ordering them to keep their hands out of their pockets. No one, other than the parties and an occasional witness, was asked (or permitted) to contribute to the proceedings, and onlookers who made the mistake of wandering onto the veranda were ordered to leave.

Often, the magistrates' questions seemed concerned with eliciting only such evidence as directly related to the dispute immediately before the court. For example, in the sorcery case in Tubuserea, the court made no attempt to discover (and thus to resolve) the manifold and multilayered conflicts and disagreements between the brothers that, in all probability, had contributed to their resentment and prompted the sorcery charge. The

magistrates' questions, and the parties' responses, were limited to a discussion of the means and methods of sorcery that the older brother might have used and to his denial of the charge. Similarly, in the Gerehu case in which a wife wanted the court to order her husband's return, the court did not inquire into the status of their marriage, the quality of their relationship, or any of the reasons why the absent spouse might have chosen to remain in his home region, all of which might have been questions of great interest and import to the participants in a traditional dispute-settlement forum, who would believe that in order to achieve a reconciliation among the parties it was necessary to ascertain the totality of the dispute.

Finally, the way in which the magistrates shaped the hearings seemed to make the magistrates the central decision makers, precluding either mediation or an opportunity for the parties themselves (or their fellow villagers) to contribute to the fashioning of a settlement to their dispute. The centrality of the magistrates was established by their control of the questioning of the parties, and, at the close of each case, by their retiring for a few minutes of discussion among themselves and returning to give a lecture and issue a judgment. The solution to the dispute did not arise out of a process of discussion, compromise, and eventual conciliation by the parties themselves, the ideal of the traditional model. Moreover, the magistrates in the Gerehu Village Court used the criminal jurisdiction of the court to solidify the court's authority. In three cases that had been brought to the court as civil disputes, the magistrates took it upon themselves to decide the cases as criminal matters as well. In the driver's license case, the court fined both the plaintiff and the defendant for taking part in an unlawful activity; in the beer case, the court lectured the parties about their improper and unlawful behavior; and in the case concerning unauthorized use of produce from a garden, the Gerehu Village Court ordered both compensation and a fine.

The importance of these formalistic aspects of the village court process should not be overstated, however. In providing the accoutrements and decorum of a government hearing, magistrates manipulate formalism to achieve informal ends. They use the symbolism of their ties to the government in order to give them the authority that village elders and big-men would once have received from traditional symbols and from the cohesion of the group (Westermarck 1978, 91-93; Gordon and Meggitt 1985, 231; A. Strathern 1984, 60-61). It is also possible that the eyes of Western observers mistake the content of the symbolism. While it is true that the

rope-bordered area in Tubuserea and the veranda in Gerehu look a bit like a local court or a *kiap*'s office, they also look very much like a traditional ceremonial ground or *haus tamburan*. The Papua New Guinea flag, with its bird of paradise, is no less totemic than the giant masks or carvings that adorn clan houses, where momentous decisions are also made. Finally, the village courts are not rigidly bound by formalism. While in some cases and for some purposes, the magistrates limit the discussion to those issues immediately before the court, in other cases, they will broaden or recast the issues in ways beyond the powers (and outside the ken) of formal, Western court proceedings.

Substantive Customary Law in the Tubuserea and Gerehu Village Courts

Substantive customary law and customary legal process were major features of Tubuserea and Gerehu village court hearings. Like the Kainantu and Enga courts, the courts of Tubeserea and Gerehu heard disputes concerning matters common to customary law. All three cases heard by the Tubuserea Village Court concerned matters—the payment and distribution of bride-price, the making of a customary marriage, and sorcery—that would have come before traditional tribunals as well, and all three were decided with reference to customary norms. Of the four cases heard in Gerehu, two involved subjects—driver's licenses and illicit beer sales—that would not have occurred in a precolonial village, but two involved the customary issues of marriage and the use of garden land; and all four matters were decided according to the norms of the community, without reference to the imported law. The two village courts differ in their application of substantive customary law. Whereas the Tubuserea court seems intent on reaffirming tradition, the Gerehu court is, in effect, creating a new system of customary norms for a new community.

The desire of the Tubuserea Village Court to reaffirm customary law and process is demonstrated in the two cases it heard that involved marriage and bride-price. In the case in which a young man's parents asked that he be ordered to return home, the court was in effect being asked to decide whether customary norms would permit the parents to halt the couple's relationship and, if not, whether the couple were married and bride-price therefore due. Motu customary law recognizes several points at which bride-price will or can be paid (Law Reform Commission 1975; 1986). Payments occur when the couple takes up residency together, at the birth of a child, and at points in between. The commencement of marriage

is viewed not as a single event but as a gradually solidifying process. The court ruled that it had the power neither to order the young man's return nor to require the payment of bride-price. By seemingly declining to make an order, the court effectively levered the two families into negotiating the terms of the marriage. This outcome supports the primacy both of substantive customary law and of the principle that customary law is not a set of rigid rules but a flexible framework in which negotiation can occur. The outcome itself mirrored the customary process and could not have occurred were it not that Motu customary law is sufficiently flexible to permit the court to devise such an outcome.

The Tubuserea court's other bride-price case also demonstrates the court's concern that customary law be found and applied in traditional ways. To assist it in resolving the conflict about which uncle ought to have distributed the bride-price, the court called on village elders to elucidate the applicable customary norm. The court may have called for assistance from the elders because the norm was obscure, or in resolving a contentious dispute it might have felt a need for the authority that a pronouncement by elders confers. As well, by deferring to the elders, the court was modeling for villagers a traditional method for finding the law, and thereby reinforcing continued reliance on this traditional procedure.

Gerehu is too new to have traditions, and one task of the Gerehu Village Court is to supply traditions ready-made. In all four cases heard, the statutes and case law of the imported legal system were potentially implicated, and in all four the village court chose to apply customary law, thus choosing not to defer to the imported legal system. For example, offering to sell driver's licenses and purchasing beer from unlicensed premises are statutory offenses, and could have been referred to a higher court, which would have handled the case as a criminal matter, meting out criminal penalties in keeping with the statute, and affording no compensation to the complaining parties. Instead, the magistrates preferred to retain jurisdiction over both cases and were thus able to treat one with a mixture of compensation and fines and the other as a matter for compensation alone. Similarly, a spouse's abandonment and divorce is subject to statute if the marriage has been contracted under statute, but, in the case involving the absent husband, the Gerehu Village Court chose not to ask the form of the marriage, thereby preserving jurisdiction (and flexibility) for itself.

The conflict over use rights to garden land might also have implicated the laws of the imported legal system, but the court resolved the dispute

between two women over the use of garden land as if it were solely a customary law matter. While this was a dispute that could have arisen in a precontact village, and would have been decided in that context according to customary norms about land use, this particular dispute concerned alienated land that, though freely used for gardens by Gerehu residents, is owned by someone (probably the government) in fee simple. Under the norms of the imported legal system, the holder of the fee simple should decide which parties can use the land. However, the village court did not refer the issue to the putative owner or to the imported law.

In the manner in which it found and applied customary law to this dispute, the court demonstrated the differences between its circumstances and those of the courts in more traditional and homogeneous villages such as Tubuserea. Gerehu is a new and ethnically diverse urban settlement. The village court must create a new customary law, suited to the needs and conditions of the community. In doing so, the court cannot rely for authority on the familiarity of traditional legal concepts, the assent of elders, or other factors available to the Tubuserea magistrates. However, to announce that it is creating new law would be to undermine its authority and inhibit its ability to develop a new customary law for Gerehu. This case arose between parties originally from different areas with different customs about rights over garden produce, but the court's decision of the case is phrased as if the case had arisen in a homogeneous precontact village. The magistrates did not ask the parties to explain the customary rules of garden use in their home areas, and did not attempt to resolve the dispute as if it were a problem in conflicting local laws. Instead, they assumed the existence of a universal rule, posited upon something very like natural justice, and declared that the customary law relating to gardens is that the person who plants and cares for a garden has the sole right to collect produce from the garden. In effect, the court's holding established a new norm by which future parties can order their relations and with reference to which future disputes can be settled, but it cast its holding as if the norm had always existed.

Customary Legal Process in the Tubuserea and Gerehu Village Courts

Although the formal and legalistic aspects of hearings in the village courts of Tubuserea and Gerehu are immediately obvious, the magistrates' deference to customary processes are of equal importance to the outcomes of the hearings, the relationships of parties to the law, and the development

of customary law. For example, although magistrates continually insisted that they would not hear extraneous evidence, they often entirely recast the issues in order to reach what they believed to be the real dispute. The Tubuserea Village Court, hearing a case that was framed as a request by parents that their son return home, recognized that an equally potent issue in the case was the parents' wish to avoid the heavy burden of bride-price payments. The magistrates widened the discussion to include the issues of whether the young couple was married and whether bride-price was due. Similarly, the Gerehu Village Court, presented with a case framed by the plaintiff as an action about insulting words, was prompted not only to recast the case as one involving a dispute over the use of a garden, but to switch the roles of plaintiff and defendant.

Village court magistrates do not use their authority, as judges in the court model do, to enforce a judgment on the parties (see also Westermarck 1978). Frequently, the magistrates word their decision not as an order, but as advice. Indeed, in the three cases heard in a typical morning at the Tubuserea Village Court, the magistrates never made a firm order. In the case involving the young man who was living with a young woman, the magistrates refused to order either that he return home or that bride-price be paid. In the sorcery case, the court refused even to order mediation of the dispute, instead scolding the brothers for forgetting their filial obligations and feelings. And, in the case in which uncles and their nephew feuded over the distribution of bride-price, the court held that the nephew ought to have distributed the bride-price, but pointed out that its holding was merely declaratory, as the bride-price had already been distributed. In each case, the court's refusal to issue a formal order was, in a sense, a customary ordering of the dispute, in that it placed the burden of settling the outstanding issues upon the parties and forced them into traditional and informal forums for negotiating settlement.

The Gerehu Village Court did issue orders (or attempt to issue orders) in three of its four cases, although the court's response to the woman who wanted her husband back was that it could not order him to return. Like the Tubuserea Village Court, when it did not issue orders, the Gerehu court issued advice: the magistrates told the absent husband's *wantoks* that they should intercede to procure his return. Even when issuing orders, the Gerehu Village Court did not rely for their enforcement on its peace officers or other agents of the state, but on the acquiescence and agreement of the parties. Thus, when the defendant police officer who

was accused of taking a bribe disagreed with the court's order, the magistrates responded by agreeing to rehear the case later. And, when the woman who had taken pumpkins from the garden responded angrily to the courts' order, the magistrates signalled that the next case not be called until she had discussed the case with her *wantoks*, and was ready to accept the court's decision. In looking to the acceptance of the parties as the source of the authority for their orders, rather than to police or other agencies of the state, the magistrates are honoring the customary model. They are also ensuring, in a new and heterogeneous village where tradition gives little support to the court, that the decisions of the court will be honored.

Both village courts were willing to defer to other agencies, both formal and informal, rather than to issue an order in every case. Although the courts differed in their choice of mediating forums, neither ever suggested that a party resort to a more formal court. The Tubuserea Village Court, hearing cases within lineages (and between future agnates) in a homogeneous village, tended to refer disputes back to the informal dispute settlement of the family and lineage. In the dispute between uncles over distribution of the bride-price, for example, the magistrates interrupted their own final discussion (which contained repeated statements that this was not an issue that a court could now decide) to give the bride's mother the opportunity to state her shame that this family matter was being aired before the whole village. The Gerehu Village Court, hearing cases of people trying to make their way in the urban sector, tended to refer parties to government agencies that the parties might not have known about, such as the welfare office, that could offer them assistance in this new world.

Unlike the court model, and like the compromise model, both village courts saw the reconciliation of the parties as part of their task. Like the village courts that Westermarck observed (1978, 84–85), neither of these courts acted as if it believed that reconciliation could occur as the result of a village court proceeding alone. Both attempted, however, to lay the groundwork for reconciliation, whenever possible, by distributing some benefit to each party, so that neither would feel that the other had won everything. In these attempts, the courts manipulated the norms of both substantive customary law and the imported law. When the Gerehu Village Court found that a plaintiff had attempted to bribe a police officer in order to obtain a driver's license, the court (after a lecture condemning bribery) ordered that the plaintiff's money be repaid him by the defendant

and that the plaintiff give some of the repayment as a fine to the court. In commingling criminal and civil jurisdiction, the Gerehu Village Court is not simply asserting the primacy of the courts and the state over the parties. Sometimes, it is using its power to invoke criminal penalties as a means to even the distribution of sanctions and benefits between the parties, and thereby to promote the acquiescence of both parties in its judgment.

CONCLUSIONS AND AFTERTHOUGHTS

Some critics feared, in the first years of operation of the village courts, that the courts were tending toward excessive formalism, adopting the procedures of the imported legal system and eschewing the flexible and compromise-oriented processes of traditional, informal dispute settlement. If the experience of the Tubuserea and Gerehu village courts is any guide, these fears have not been realized. Although these courts do resemble the court model on the surface (they are courts, after all), these features are balanced by the continuing adherence of the magistrates to the processes and aims of customary dispute resolution. The features of village court procedure that replicate a customary or compromise model occur not only in extrajudicial mediation sessions, but even within the context and conduct of formal village court hearings.

Much of the formalism of the village courts is inherent in the structure of the courts, as established by the Village Courts Act. In providing that village courts would have both civil and criminal jurisdiction, the act laid the groundwork for a system in which orders would be issued, fines would be paid to the state, magistrates would have a more authoritative position than parties in determining outcomes, and the presence of peace officers would remind parties that the state was actively involved in the process. The act does not expressly provide for some of the formalistic and court-like features that village courts have adopted—such as courtrooms that resemble government offices, the scheduling of civil hearings without prior attempts at mediation, decisions by magistrates to exercise their criminal jurisdiction in the course of a civil hearing, and the exclusion from the hearing of all villagers except the parties and all issues except those germane to the immediate dispute. However, these are natural outgrowths of a statute that has established, as a village dispute-settlement mechanism, an agency that looks very like a formal court, in that it has magistrates and the power to impose sanctions.

Although the formalistic elements of village court procedure are obvious, it would be misleading to overstate their importance or to mistake their aim. The symbolic (and real) authority of the court model is used by magistrates to achieve ends that are antithetical to the ends that a court model is commonly expected to achieve, ends that more closely approximate the results and purposes of the compromise model. In the court model, impartial adjudicators decide cases on a winner-take-all basis, by relating the facts of the dispute to known norms. The result is predictability, on which actors in an individualistic market system may predicate their behavior. In the compromise model, the parties reach an agreement that is, at least for the moment, mutually satisfactory. The result, when the process works, is the restoration of good relations among the parties.

Village courts contain many elements of the court model, but these are manipulated by the magistrates and blended with elements of the compromise model in such a way as to permit the village courts to achieve the results of the compromise model. Despite their frequent insistence that parties confine their evidence and discussion to the dispute immediately before the court, village court magistrates are willing to recast the terms of a hearing when it becomes apparent to them that the real dispute to be settled is not as the parties originally presented it. Similarly, in the pure terms of the court/compromise dichotomy, the order by a magistrate of a criminal penalty, such as a fine, is viewed as an indication of the state's superior control of judicial proceedings, turning the proceedings from dispute settlement between parties into social control by the state. Village court magistrates, however, mix compensation and fines, often as a way of evening out the benefits and detriments to the parties, so that compromise can be achieved. Finally, although village court magistrates permit themselves to appear powerful, they seldom exercise that power. In a typical day of hearings in Tubuserea, the village court magistrates never issued an order. In Gerehu, where the magistrates have had less experience, they made orders, but pulled back on those that did not have the agreement of the parties. The appearance of magistrate centrality cloaks a reality of party equality in village court hearings.

Because the study on which this article draws was limited to only two village courts and to a relatively short time period, its generalizations can be offered only as hypotheses. Given the creativity with which each court responds to its particular circumstances and the varieties in customary law and process around the country, one would expect courts in different areas to exhibit very different characteristics. For example, in their mixing

of elements of the court and compromise models, the village courts of Tubuserea and Gerehu differ in ways that reflect the differences between the two communities in which they function. The Tubuserea Village Court is located in a community that, though undergoing economic change, is basically traditional and ethnically homogeneous. In its restatements of substantive customary law and in its deference to community elders, the village court helps to maintain the traditional norms and social structure against the incursions of a modernizing economy. The magistrates of the Tubuserea Village Court are unwilling to issue binding orders, both because doing so would undermine the customary dispute-settlement process, which is party-centered, and because, as members of a cohesive community, they seldom need to. The Gerehu Village Court is located in a new and diverse settlement, which must find itself as a community and help its inhabitants make their way in the modernized sector. The court furthers these aims in its creation of a customary law (which is based on common understandings of customary norms rather than on the imported statutory or case law) for the community and in linking members of the community to outside assistance agencies. The magistrates of the Gerehu Village Court, who do not yet have the support of a community that cannot yet be said to exist, use symbols of the court's relationship to the state, such as the flag or the issuance of fines, to assert an authority which they then use to empower customary law.

The village courts are attempting to apply customary law and to follow customary legal process in a society very different from the small, stateless societies in which customary law was developed. In this endeavor, customary law is undergoing changes, but the act of governing a society using the principles and processes of customary law will also change the course of that society. A short-term study of two village courts can only begin to document the various and creative ways in which village courts will blend the compromise and court models in their pursuit of the aims of customary law and the consequences of this blending, both to the legal system and to the societies in which the village courts are operating.

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Note

1 The initial phase of this ongoing study, during which the observations presented here were gathered, was conducted in the summer of 1988. In addition to myself, Bruce L. Ottley of the DePaul University School of Law and Christine Stewart of the Papua New Guinea Law Reform Commission participated in the study. We observed the hearings held in two village courts, both in villages located near Port Moresby, Papua New Guinea's capital. One, Tubuserea, is a traditional Motu village and the other, Gerehu, is a new urban settlement. At that time, the courts were holding hearings only once a fortnight (by 1989, the Gerehu Village Court was holding hearings twice a week), so our opportunity to observe the courts in action was limited to several sessions of each. The findings presented in this article can be taken only as preliminary, and our study is continuing. In addition to observing the courts, we read through court records and discussed our study with Peni Keris, secretary of the Village Courts Secretariat; Francis Iramu, senior supervising magistrate for the village courts that we observed and author of the major governmental study advocating the creation of village courts (Desailly and Iramu 1972; Iramu 1975), and with magistrates of the village courts, justices of the Papua New Guinea Supreme Court, lawyers, law lecturers, and others, all of whom we thank.

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